

**Desai v St. Vincent's Midtown Hosp.**

2010 NY Slip Op 33493(U)

December 20, 2010

Supreme Court, New York County

Docket Number: 115982/08

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

DESAI, VIDYA, ETAL.

INDEX NO. 115982/08

MOTION DATE 10/5/10

- v -

ST. VINCENT'S HIGHTOWN HOSPITAL, ETAL.

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-8

9-13

14

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED

NEW YORK COUNTY CLERKS OFFICE

Dated: 12/20/10

JSh  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
VIDYA DESAI, as Administrator of the Estate of  
DILIP DESAI and VIDYA DESAI, Individually,

Plaintiff,

Index No. 115982/08

- against -

**Decision and Order**

ST. VINCENT'S MIDTOWN HOSPITAL, and  
LEONARD PENACERRADA, M.D.,

**FILED**

Defendants.

FILED

-----X  
JOAN B. LOBIS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants St. Vincent's Midtown Hospital ("SVMH") and Leonard Penacerrada,

M.D., move, by order to show cause, pursuant to C.P.L.R. Rule 3212, for an order dismissing this  
action. For the reasons set forth below, the motion is denied.

This action, sounding in medical malpractice, arises out of nearly twelve hours of  
medical care administered to Dilip Desai at SVMH in March 2007. Mr. Desai, aged 55 years old,  
presented to SVMH's emergency room via ambulance complaining of abdominal pain and vomiting  
at 2:05 p.m. on March 9. The onset of his symptoms occurred just after he had eaten lunch. Dr.  
Penacerrada attended to Mr. Desai. At approximately 3:57 p.m., Mr. Desai underwent an  
electrocardiogram ("EKG") at Dr. Penacerrada's direction, because, according to the doctor's  
examination before trial ("EBT") testimony, abdominal pain can be a symptom of a heart attack.  
Aside from revealing an accelerated heart rate, the EKG results were not significant. Mr. Desai was  
examined intermittently throughout the remainder of the day and continued to report abdominal pain.  
According to Dr. Penacerrada's EBT testimony, Mr. Desai had no chest pain, no trouble breathing,

no chills, and no fever. At approximately 12:30 a.m. on March 10, staff at SVMH were preparing Mr. Desai for a CT scan when he vomited and became unresponsive. Attempts to resuscitate Mr. Desai were unsuccessful and he was pronounced dead at 1:40 a.m. on March 10.

An autopsy was performed on March 11, 2007. The medical examiner determined that Mr. Desai died from atherosclerotic cardiovascular disease, a condition marked by a build-up of fatty materials on the artery walls. There were no signs of thrombus or embolus in his venae cavae or pulmonary arteries. Mr. Desai's heart was further examined by CryoLife, Inc., an organ donation center. According to the cardiac pathology report, dated March 22, 2007, there was no evidence of intraluminal coronary thrombus. Atherosclerotic cardiovascular disease was present and caused 90% stenosis, or narrowing, in Mr. Desai's right artery and 75% stenosis in his left anterior descending and left circumflex coronary arteries.

Plaintiff commenced this action by the filing of a summons and complaint on or about November 28, 2008. Plaintiff alleges, *inter alia*, that defendants failed to monitor and diagnose Mr. Desai's cardiac condition, which resulted in "an untreated and ongoing heart attack, with resultant and consequent pain, suffering, and wrongful death[.]"

A defendant moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." *Roques v. Nobel*, 73 A.D.3d 204,

206 (1st Dep't 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted).

Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Rogues, 73 A.D.3d at 207 (internal citations omitted).

Defendants rely on the affirmation of Stephen M. Factor, M.D., who is board certified in anatomic and clinical pathology with a specialization in general and cardiovascular pathology. Dr. Factor asserts that Mr. Desai died of a sudden cardiac arrhythmia, caused by coronary artery disease, and not a myocardial infarction (the medical term for "heart attack"). Dr. Factor sets forth that, after reviewing the pathology reports as well as the slides themselves, signs of myocardial infarction—namely necrosis of the heart, fibrosis of the heart muscle, and unstable changes in the arteries—were not present. Dr. Factor further asserts that a myocardial infarction would have caused Mr. Desai's aorta to rupture or tear, neither of which occurred. Dr. Factor concludes that plaintiff's allegations "are without merit[,] because . . . Mr. Desai did not die of a myocardial infarction (heart attack)."

In opposition, plaintiff presents an affidavit from Helen Kane, M.D., who is board certified in internal medicine. Dr. Kane agrees with Dr. Factor that Mr. Desai's death was due a cardiac arrhythmia. Dr. Kane asserts that the arrhythmia was caused by a stenotic right artery, which in turn was caused by cardiac disease. She sets forth that defendants should have suspected a severely stenotic right artery because Mr. Desai presented "in the textbook pattern of midepigastic pain, nausea, and diaphoresis."<sup>1</sup> Dr. Kane asserts that EKGs are widely known to be inadequate in diagnosing acute cardiac disease, so the EKG performed was insufficient to monitor Mr. Desai's cardiac condition. Dr. Kane contends that defendants should have further monitored Dr. Desai, although she does not specify what type of monitoring was required; treated him with nitrate medicines; and analyzed his serial cardiac enzymes. Plaintiff's expert maintains that the failure to pursue this course of treatment was a deviation from the standard of care. She sets forth that had Mr. Desai been monitored and given nitrate medicines his "cardiac arrhythmias would have been discovered and treated." The failure to do so, Dr. Kane asserts, was a direct cause of Mr. Desai's death.

In reply, defendants set forth that both Dr. Factor and Dr. Kane have conclusively established that Mr. Desai did not die from a heart attack as claimed in the bill of particulars. Therefore, they argue that plaintiff's "allegations are unsupported and must be dismissed as matter of law."

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<sup>1</sup> It is not clear from the records that Mr. Desai presented with diaphoresis.

Although defendants maintain that plaintiff's case depends on whether Mr. Desai suffered a heart attack, the bill of particulars set forth a number of departures related to heart monitoring that defendants failed to address. Although inartful, the non-technical bill of particulars was sufficient put defendants on notice of plaintiff's broader claim of malpractice related to Mr. Desai's cardiac treatment and of plaintiff's position that this allegedly negligent treatment caused Mr. Desai's death. See Wyckoff v. Jujamcyn Theaters, Inc., 11 A.D.3d 319, 320 (1st Dep't 2004). By focusing solely on the words "heart attack" instead of the allegations as a whole, defendants have failed to meet their prima facie burden for summary judgment. Even if defendants had met their prima facie burden, plaintiff has offered expert testimony to support her claim that defendants deviated from the standard of care, which further precludes a summary judgment award. See Roques, 73 A.D.3d at 207. Accordingly, it is hereby

ORDERED that the motion for summary judgement is denied; and it is further

ORDERED that the parties shall appear for trial, as previously scheduled, on January 24, 2011, at 9:30 a.m.

Dated: December 20, 2010

  
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JOAN E. LOBIS, J.S.C.

**FILED**

DEC 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE